

*“What's in a name? That which we call a rose
By any other name would smell as sweet.”*
— William Shakespeare, Romeo and Juliet

Apologies to William Shakespeare, “names” are vital in our modern-day society. In many cases, they connote the very businesses that they represent. From computer manufacturers, to automobile producers, to purveyors of shoes and purses, “names” mean everything.

For cities and towns in the Commonwealth, which are seeking to increase sources of revenue as a potential means of financing public building and public works projects, the emphasis and prestige of “names” hold great promise. Municipalities that seek to construct or to renovate an athletic field may offer the possibility of naming the complex after a certain donor or individual. This memorandum will consider the steps that a particular municipality is required to undertake during a particular public works project – from fundraising to naming.

1. Fundraising and Accounting and Naming Rights

Suppose that Town X wishes to install a synthetic turf field at its pre-existing athletic complex. It desires to solicit funds from private donors. The immediate question involves the process by which it will privately fundraise and by which it may attach naming rights to that facility and any restrictions placed upon its ability to assign naming rights to such donors and other third parties.

For a city or a town interested in engaging in such project-specific fundraising from private, business, or charitable groups, the first issue involves the mechanics of fundraising and accounting. Ultimately, the city or town is first required to establish a gift account for the project. While this may be basic, and while this step may not involve outside individuals, the establishment of a receiving account is critical to allow any fundraising process to move forward.

At the outset, a city or town may be approached by one or more individuals. Indeed, the law is clear that any officer of the city or the town may receive the grant or the gift. The city or town may also begin to approach individuals. Regardless, a city or a town faces a situation in which monies received are typically donated to the entity for a specific purpose.

Funds are deposited with the city or town treasurer. Once received, such monies remain with the particular gift account and remain in such an account until the time is ripe for expenditure. If expended for an educational purpose, the expenditure of such funds requires the approval of the local school committee. If expended for any other purpose, the expenditure of such funds requires the approval of the board of selectmen of a town and the approval of the mayor and the city council of a city. Monies so received, thereafter, may be spent by the particular city or town under M.G.L. c. 44, §53A, without further appropriation.

For cities and towns which fundraise, is there any prohibition against considering donees for naming rights? The answer is absolutely not. While it is true that current vendors cannot use the process as a means of influencing public contracting in the Commonwealth, local businesses that donate to a public entity for a project in which they do not have a contract may be considered for naming rights.

2. Procurement of Naming Rights

A. Requirements

While cities and towns are required to comply with all applicable public works construction statute and public building construction procurement statutes, M.G.L. c. 30, §39M, and M.G.L. c. 149, §§44A *et seq.*, in constructing facilities, naming rights are not subject to procurement. Moreover, while goods and services are also subject to the Commonwealth of Massachusetts Uniform Procurement Act, and are, therefore, subject to the provisions of M.G.L. c. 30B, naming rights fall outside the scope of the Act.

The Office of the Inspector General, which administratively oversees the Uniform Procurement Act has specifically ruled:

Other examples of where the subject of a contract is not a supply or service are advertising and naming rights. A governmental body may grant naming rights to an athletic field or auditorium without following M.G.L. c.30B since naming rights do not fit the definition of a supply or service subject to M.G.L. c.30B.

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This exemption effectively means that a city, town, or other entity typically covered by M.G.L. c. 30B, M.G.L. c. 30, §39M, and M.G.L. c. 149, §§44A *et seq.* is not required to issue an Invitation for Bids or a Request for Proposals in order to award naming rights to certain facilities.

B. Desirability of Using a Procurement Process

Nothing in the foregoing precludes a city or a town from using a procurement process for seeking naming rights. A city or a town would be free, therefore, to use “sound business practices” to procure naming rights. Alternatively, the town may choose to use a more formal process, such as a proposal process.

There are certainly advantages for a city or a town in choosing to use a formal procurement process (such as a Request for Proposals (RFP) process). At the outset, a formalized procurement process places potential proposers on “equal footing” with each other. Each potential responder or proposer would have equal access and ability to submit a proposal to the particular city or town. This increased level of fairness, moreover, has the potential to attract a broader audience and to assure potential responders or proposers that their proposals would be evaluated fairly and formally.

Formality also helps to insulate cities and towns from charges that they are engaging in favoritism or are engaging in conduct not in the best interest of the public entity. By requiring an

award, for example, to the responsible and responsive proposer which has submitted the most advantageous proposal, a city or a town is ensuring that it will avoid negotiated outcomes and sideline deals with potential donors. Effectively, this promotes the causes of good government on all sides.

While formality is often desirable, however, the decision to use a formal procurement process through a vehicle such as an RFP also is accompanied by drawbacks. The construction of an RFP requires the awarding authority to devise a formal rubric of evaluation criteria and requires it to evaluate proposals according to the criteria specified. The city or town involved loses some of the evaluative flexibility in establishing these criteria and in being required to apply them uniformly and fairly. All proposals are subject to the same standards and are required to be evaluated in the same manner. Therefore, as in any RFP, where proposals are evaluated as being “highly advantageous,” “advantageous,” and “not advantageous,” all proposals are required to be evaluated in this manner.

Additionally, by requiring a formal process, cities and towns using the RFP are also assuming the risk of subjecting themselves to the jurisdiction of the Inspector General’s administrative review process unless it clearly states that M.G.L. c. 30B does not apply. Imposing an administrative review process also means that the awarding authority’s evaluation is subject to protest and challenge by disgruntled individuals. It could also bring judicial challenge through a potential injunction. Such proceedings are inherently time consuming and expensive. They also have the potential to delay naming public facilities.

Hence, there are certainly advantages and disadvantages to pursuing a formalized procurement process. Cities and towns should weigh their options very carefully in deciding whether to proceed with issuing a formalized procurement process, such as an RFP.

3. Restrictions Placed Upon Naming Buildings after Public Officials.

Cities and towns often name buildings and facilities after individuals, organizations, and groups that have contributed to public service. Moreover, such naming rights have been bestowed upon individuals who have contributed to the public good at the federal, state, or local level. At all times, naming rights should be consistent with the values of the city or town. Local officials should conduct a full and fair background check to ensure that the naming of a particular facility will be consistent with such values.

Where current public officials are involved, however, the process is complicated by the Commonwealth of Massachusetts State Ethics Law, M.G.L. c. 268A. M.G.L. c. 268A, §23(b) (2), which prohibits any public official from receiving, by virtue of his or her position, something not generally available to the public at large. Naming rights would not be excluded from this analysis. Consequently, it would be best to avoid soliciting public officials for gifts and to consider them for naming rights.

4. Types of Policies that May be Adopted for Donations.

Cities and Towns will often desire flexibility in changing names as times change. Individuals and their estates should not hamper such processes. For cities and towns interested in offering an incentive to individuals, the need for flexibility should also be championed.

Any gift given should be unrestricted and unconditional. Cities and towns should be at liberty to spend monies for a particular project without the worry that the donee will attempt to take back its gift should the municipality attempt to alter the naming right. Donees should be apprised that all gifts are unconditional, and that there is no *quid pro quo* or conferring of a property interest in a naming right. By disclaiming a cause of action associated with a potential rescission, as well as notifying potential donees that they shall not be entitled to notice and a hearing of such a potential rescission, cities and towns will best preserve such flexibility.

In this vein, cities and Towns contemplating a naming right after a donation may wish to consider a policy similar to the following:

Town X will consider approving a naming right for a building at the following donor thresholds:

Pressbox - \$ xx,000

Concession Stand - \$xx,000

Locker Room- \$xx,000

Other Building Y - \$xx,000

Other Building Z - \$xx, 000

Town X recognizes that buildings generally vary in size, scope, geography, and economics. Any donation below such thresholds is considered a valuable contribution to Town X. Town X will consider extending additional naming rights for individuals donating below such thresholds on a case by case basis. Please understand, however, that such naming rights and this policy do not constitute an enforceable contract between the Donee and Town X. Town X reserves the right to rescind such naming rights at any time, and for any reason, and for no reason at all. In any and all such cases, Town X reserves the right to retain whatever donation is made. Such donation is to be considered an unrestricted and unconditional gift to it. Donee shall have no cause of action whatsoever to the rescission of naming rights. Naming rights shall not be considered property. The named individual shall not be entitled to notice or to a hearing. By submitting a donation, and by being considered for a naming right, the individual accepts the foregoing conditions and agrees to abide by Town X's policy.

5. Rescission of Naming Rights

Circumstances also warrant rescission of naming rights for cause. Cities and towns will always desire to remove naming rights immediately for those donees who commit crimes, break laws, or otherwise act contrary to the values of the public good.

To promote such a goal, cities and towns should establish that naming rights will always be rescinded for those who undermine public law or decency.

In fact, in creating naming rights policies, cities and towns should also include in their policies the following clause:

Rescissions of naming rights, notwithstanding the foregoing, will always occur under the following conditions:

1. *The named individual or entity is determined to have violated federal or state law or is inconsistent with public decency, morale, or good.*
2. *The named individual or entity submits a signed, sworn statement that it no longer wishes to have a name associated with a particular building.*

Naming rights are, with apologies to Shakespeare once again, veritable “roses” to those who give. They are tantamount to a recognition of a donee’s service and generosity to the community. They remain attached to the public building or work at the will of the public entity and are subject to local desire and regulation. Not subject to procurement, they may be granted in a flexible manner. They may also be rescinded or revoked at the entity’s discretion. A wise entity will always seek to convey this to potential donees.

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